

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 March 2004

Case No.: 2003-BLA-05540

In the Matter of

BARBARA E. ANTOLIK, Widow of
ROBERT ANTOLIK
Claimant

v.

EMERALD ANTHRACITE
Employer

and

THE FIRE & CASUALTY COMPANY
OF CONNECTICUT
Carrier

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest

Appearances: Jerome L. Cohen, Esquire
For Claimant

Christopher Pierson, Esquire
For Employer/Carrier

Before: ROBERT D. KAPLAN
Administrative Law Judge

DECISION AND ORDER
DENYING BENEFITS

This proceeding arises from a claim for survivor's benefits under the Black Lung Benefits Act, 30 U.S.C. §§901-945 ("the Act") and the regulations issued thereunder, which are

found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.¹

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a dust disease of the lungs resulting from coal dust inhalation.

On February 4, 2003 this case was referred to the Office of Administrative Law Judges for a formal hearing. Subsequently, the case was assigned to me. The hearing was held before me in Wilkes-Barre, Pennsylvania, on October 10, 2003 where the parties had full opportunity to present evidence and argument. Pursuant to my prior rulings, the following documents were submitted: the deposition of Dr. Jung T. Huang taken on November 18, 2003 (CX 5); the deposition of Dr. Gregory J. Fino taken on February 4, 2004 (EX 2).² These exhibits are herewith received in evidence. Employer/Carrier (hereinafter “Employer”) and Claimant filed briefs on March 1 and 9, 2004, respectively.

I. ISSUES

At the hearing Employer conceded that it is the responsible operator and the Carrier is the responsible insurance carrier. Employer also withdrew all previously controverted issues other than the presence of pneumoconiosis and whether pneumoconiosis caused the miner’s death. (T 6) In their post-hearing briefs, the parties were in agreement that the miner had a coal mine employment history totaling 29 years.

Thus, the issues remaining to be adjudicated are (1) whether the presence of pneumoconiosis has been established, and (2) whether the miner’s death was due to pneumoconiosis.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

Robert Antolik, the miner, was born on November 10, 1934 and died on January 16, 1998. Claimant and the miner were married to each other on November 18, 1958. Claimant is the sole dependent of the miner who is eligible for survivor’s benefits under the Act. (DX 1, CX 1; T 9) The miner was employed by Employer in strip mines where he operated heavy equipment. (DX 1) He last worked in coal mine employment in 1985. (DX 1)

¹ The regulations cited are the amended regulations that became effective on January 19, 2001. 20 C.F.R. Part 718 (2001).

² The following abbreviations are used herein: “DX” denotes Director’s Exhibit; “CX” denotes Claimant’s Exhibit; “EX” denotes Employer’s Exhibit; “T” denotes the transcript of the October 10, 2003 hearing.

Claimant filed her current claim for survivor's benefits on January 24, 2002. (DX 3) ³ The District Director denied benefits on November 7, 2002. (DX 17) On December 2, 2002 Claimant requested a formal hearing. (DX 18)

Claimant testified that the miner had problems breathing that became progressively worse, and that he had a productive cough with black material in his mucous. The miner was prescribed oxygen for his breathing problem near the end of his life. Claimant also testified that the miner had smoked cigarettes. (T 12-15, 17-18)

B. Discussion

Because this claim was filed after the enactment of the Part 718 regulations, Claimant's entitlement to benefits will be evaluated under Part 718 standards. §718.2. Section 718.205(a) provides that in order to establish entitlement to survivor's benefits under Part 718, Claimant must prove that the miner had pneumoconiosis, that it arose out of his coal mine employment, and that the miner's death was due to pneumoconiosis. Claimant has the burden of establishing each element of entitlement by a preponderance of the evidence. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

Death due to pneumoconiosis may be established under §718.205(c) by any one of the following criteria:

1. Competent medical evidence establishes that pneumoconiosis was the cause of the miner's death.
2. Evidence that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis.
3. Under §718.304, the miner suffered from a chronic dust disease of the lung and chest X-ray evidence shows one or more large opacities (greater than 1 centimeter), biopsy or autopsy shows massive lesions in the lung, or other evidence (in accord with acceptable medical procedures) show a condition which could reasonably be expected to yield such large opacities or massive lesions.

Section 718.205(c)(5) provides that pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. §718.205(c)(5). Similarly, the Third Circuit Court of Appeals has held that pneumoconiosis constitutes a "substantially contributing cause" where it shortens life or hastens death, even "briefly." Lukosevich v. Director, OWCP, 888 F.2d 1001 (3d Cir.1989).⁴

³ Claimant filed an earlier survivor's claim on March 25, 1998, but the claim was withdrawn on June 24, 1999. (DX 1) The parties agreed that no claim filed by the miner remains viable. (T 4-5)

⁴ This case arises in the jurisdiction of the United States Court of Appeals for the Third Circuit because the miner's coal mine employment took place in Pennsylvania.

In the instant case, it must first be determined whether the presence of pneumoconiosis has been established, pursuant to § 718.202.

Presence of Pneumoconiosis

There are four means of establishing the existence of pneumoconiosis, set forth at § 718.202(a)(1) through (a)(4):

- (1) X-ray evidence. § 718.202(a)(1).
- (2) Biopsy or autopsy evidence. § 718.202(a)(2).
- (3) Regulatory presumptions. § 718.202(a)(3).
 - a) § 718.304 - Irrebuttable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis.
 - b) § 718.305 - Where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of totally disabling respiratory or pulmonary impairment.
 - c) § 718.306 - Rebuttable presumption of entitlement applicable to cases where the miner died on or before March 1, 1978 and was employed in one of more coal mines prior to June 30, 1971.
- (4) Physician's opinions based upon objective medical evidence § 718.202(a)(4).

The Third Circuit has held that, in considering whether the presence of pneumoconiosis has been established, "all types of relevant evidence must be weighed together to determine whether the claimant suffers from the disease." Penn Allegheny Coal Co. v. Williams, 114 F.3d 22, 25 (3d Cir. 1997).

X-ray evidence, § 718.202(a) (1)

Under § 718.202(a)(1), the existence of pneumoconiosis can be established by chest X-rays conducted and classified in accordance with § 718.102.

The record contains the reports of 46 interpretations of chest X-rays, only three of which were interpreted as positive for pneumoconiosis.⁵ Two of the three positive interpretations were by Dr. Cragle; the third was by Dr. Gaia. Drs. Cragle and Gaia are radiologists, but there is no indication that they are B-readers.⁶ All the interpretations by B-readers (Drs. Bennett, Barrett, Wolfe, and Fino) were negative for pneumoconiosis. It is well-established that the interpretation of an X-ray by a B-reader may be given additional weight by the fact-finder. Aimone v. Morrison Knudson Co., 8 B.L.R. 1-32, 34 (1985); Martin v. Director, OWCP, 6 B.L.R. 1-535, 537 (1983); Sharpless v. Califano, 585 F.2d 664, 666-7 (4th Cir. 1978). Based on the foregoing, I find that the negative interpretations greatly outnumber and outweigh the positive interpretations.

Thus, Claimant has failed to establish the presence of pneumoconiosis by the X-ray evidence, pursuant to § 718.202(a)(1).

Biopsy or autopsy evidence, § 718.202(a)(2)

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. § 718.202(a)(2). However, examination of pleural fluid obtained from the miner on July 7, 1997 indicated the presence of cancer, while pneumoconiosis was not reported. (DX 1: 7/7/97 report by Drs. Won, Salam and Ross.) Thus, the presence of pneumoconiosis has not been established pursuant to § 718.202(a)(2).

Regulatory presumptions, § 718.202(a)(3)

A determination of the existence of pneumoconiosis may also be made by using the presumptions described in §§ 718.304, 718.305, and 718.306. Section 718.304 requires X-ray, biopsy or equivalent evidence of complicated pneumoconiosis which is not present in this case. Section 718.305 is not applicable because this claim was filed after January 1, 1982. § 718.305(e) Section 718.306 is only applicable in the case of a deceased miner who died before March 1, 1978. Since none of these presumptions is applicable, the existence of pneumoconiosis has not been established under § 718.202(a)(3).

Physicians' opinions, § 718.202(a)(4)

The fourth way to establish the existence of pneumoconiosis under § 718.202 is set forth as follows in subparagraph (a)(4):

⁵ Of these, 31 interpretations are described in EX 1, pp. 21-23.

⁶ A B-reader ("B") is a physician who has demonstrated a proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. 42 C.F.R. § 37.51. A physician who is a Board-certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. § 727.206(b)(2)(iii)(2001).

A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

Section 718.201(a) defines pneumoconiosis as “a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment” and “includes both medical, or ‘clinical’, pneumoconiosis and statutory, or ‘legal’, pneumoconiosis.” Section 718.201(a)(1) and (2) defines clinical pneumoconiosis and legal pneumoconiosis. Section 718.201(b) states:

[A] disease “arising out of coal mine employment” includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

The record contains the statements of Drs. Hiscox, Huang, Kotch, and Fino containing their opinions with regard to whether the presence of pneumoconiosis has been established. In weighing these opinions, the following guidelines are applicable:

- A medical opinion is well-documented and reasoned when it is based on evidence such as physical examinations, symptoms, and other adequate data that support the physician’s conclusions. See Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987); Hess v. Clinchfield Coal Co., 7 B.L.R. 1-295 (1984). A medical opinion that is undocumented or unreasoned may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 B.L.R. 1-149 (1989); see also Duke v. Director, OWCP, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how the underlying documentation supports his or her diagnosis).
- A medical opinion is adequately documented if it is based on items such as a physical examination and an accurate smoking history and report of coal mine employment. See Perry v. Director, OWCP, 9 B.L.R.1-1 (1986).

The miner was treated by Drs. Hiscox, Huang and Kotch, family medical practitioners who at one time were associated in the “Mercy Family Practice.” It appears that Dr. Kotch left the Mercy Family Practice sometime between 1993 and 1997.

In a note dated November 10, 1993 Dr. Kotch stated that the miner had “severe cor pulmonale – chronic obstructive pulmonary lung (sic) disease secondary to anthracosilicosis.” Dr. Kotch stated that the miner worked in coal mine employment for 25 years and that this

contributed to his lung condition. (DX 10) The physician's statements meet the definition of pneumoconiosis in § 718.201. However, as Dr. Kotch provided no underlying information that supports his opinion other than the miner's lengthy coal mine employment history, I find that his opinion is not documented or reasoned. Therefore, the opinion of Dr. Kotch is entitled to no weight.

In a letter dated October 9, 1997 Dr. Hiscox stated that the miner had a history of chronic obstructive pulmonary disease (hereinafter, "COPD") secondary to cigarette smoking and anthracosilicosis. In this report the physician also noted that the miner had recently been diagnosed with small cell carcinoma of the lung which was treated with chemotherapy by Dr. Patrick Kelly, and had additional medical conditions, including arteriosclerotic cardiovascular disease. The report further noted that the miner had been treated by Dr. Dineshkumar Talati, a pulmonologist. (DX 10) In a report of the miner's hospitalization in May 1997 Dr. Hiscox states that he had smoked cigarettes since his early 20s and continued to smoke at that time. (DX 10) Although statements of Dr. Hiscox meet the definition of pneumoconiosis, he too failed to explain the basis for his opinion. I therefore find that his opinion is not documented or reasoned and is entitled to no weight.

Dr. Huang certified the miner's death certificate. (CX 1) In that document, one of the listed immediate causes of death was "coal miner's pneumoconiosis," and it was stated that this diagnosis was based on "history and clinical presentation." Other listed immediate causes of death were "decompensated respiratory status" and "carcinoma of lung."

Dr. Huang authored a letter dated October 23, 1997 in which he stated that the miner had a coal mine employment history of 30 years and "is a heavy smoker." Dr. Huang opined that the miner "had pulmonary compromise from working in the mines" and "it is unfair to state that his pulmonary handicap was solely from his smoking." The physician also stated that he had seen the miner only one time in the hospital and the miner was being followed on an outpatient basis by Dr. Hiscox. (DX 10) Dr. Huang also authored a letter dated June 9, 2003. (CX 2) In this letter he stated that he had observed the miner's suffering from respiratory illness prior to his death. Here the physician stated:

I can assure you that [the miner's] suffering from chronic lung disease was more than just from the cigarette (sic). I have seen many persons suffering from excessive smoking, none of them had a such suffering (sic) as [he] did. I do believe that [the miner] had severe black lung even [though] certain eligibility guidelines were not in his favor.

Dr. Huang was deposed on October 16, 2003. (CX 5) At that time the physician stated that he was Board certified in family medicine. Dr. Huang testified that he had seen the miner one time in the office, on a date he did not know, and "I think I took care of him when he was in the hospital." Dr. Huang could not locate the miner's chart and he did not recall what the miner looked like. (CX 5 at 12-13) The physician opined that the miner's exposure to silica in his lengthy mining job would cause a chronic silicosis condition. The physician also testified that

the miner had emphysema caused by a combination of both coal mining and smoking. (CX 5 at 5, 9) Dr. Huang reasoned that with the miner's coal mine employment history of 29 years

There has to be some kind of pneumoconiosis number in my mind, unless you don't breathe the air As a coal miner ... you've got to have dust in th[e] lungs, no doubt about it. It's common sense.

(CX 5 at 9) Similarly, the physician was asked if the miner's lengthy coal mine employment history meant that "he was necessarily going to get pneumoconiosis." Dr. Huang replied, "I would believe so." (CX 5 at 26-27) In a similar vein, Dr. Huang testified that pneumoconiosis is defined as "a deposition of dust, coal mining dust deposited in the lung tissue." (CX 5 at 8) The physician also testified that cancer can be causally related to pneumoconiosis, stating

You know, the pneumoconiosis is one of the risk factors for the cancer, too, right?

(CX 5 at 25)

Dr. Huang's opinion that the miner had pneumoconiosis is problematic. First, the physician has a faulty understanding of the definition of pneumoconiosis in that he believes that it consists merely of a deposition of coal dust in the lung. Second, based on his erroneous definition of pneumoconiosis Dr. Huang incorrectly stated that a lengthy exposure to coal dust, alone, is sufficient to establish the presence of pneumoconiosis. Finally, at the time he was deposed Dr. Huang had none of the miner's medical records and he could not recall the miner's appearance. Thus, there is nothing to support the physician's statement in the death certificate that the miner had "coal miner's pneumoconiosis" based on his "clinical presentation." In light of the foregoing, I find that Dr. Huang's opinion that the miner had pneumoconiosis is entitled to no weight.⁷

Dr. Fino (Board certified in internal medicine and pulmonary disease, and a B-reader) reviewed the medical evidence at Employer's behest and issued a 25-page report dated September 15, 2003. (EX 2) Dr. Fino opined that the medical evidence does not justify a diagnosis of coal workers' pneumoconiosis or any coal mine dust related pulmonary condition. The physician made note of the fact that the overwhelming weight of the X-ray evidence is negative for pneumoconiosis. He opined that all of the miner's pulmonary problems were consistent with a lengthy cigarette-smoking history of one or two packs daily. Dr. Fino stated that the miner's severe obstructive lung disease and his lung cancer were both caused by his smoking history. The physician noted that the medical literature does not support the conclusion that there is a causal association between coal dust inhalation and cancer of the lung. Dr. Fino was deposed on February 4, 2004 at which time he reiterated the foregoing. (EX 2) The physician also testified that the miner did not have silicosis. (EX 2 at 23)

⁷ Although Drs. Kotch, Hiscox and Huang were the miner's treating physicians, their opinions are not entitled to controlling weight under § 718.104(d) because they are not reasoned and documented.

I find that Dr. Fino's opinion that the miner did not have pneumoconiosis is documented and reasoned.

As I have discredited the opinions of Drs. Kotch, Hiscox and Huang that the miner had pneumoconiosis – the only evidence that supports a finding of the presence of pneumoconiosis, Claimant has not carried her burden of proof under § 718.202(a). Further, even if I were to accept the opinions of these physicians, pneumoconiosis appears as a diagnosis in only one of the voluminous reports of the miner's hospitalizations (that of Dr. Huang dated July 1, 1997),⁸ including the report dated July 15, 1993 by Dr. Talati, a pulmonologist, and May 1997 reports by Dr. Hiscox, himself. The hospital records in conjunction with the opinion of Dr. Fino outweigh any opinion of Drs. Kotch, Hiscox and Huang that the miner had pneumoconiosis that might be credible.

In light of the foregoing, I find that the evidence as a whole fails to establish that the miner had pneumoconiosis, pursuant to § 718.202(a)(1) – (4).

Death Due to Pneumoconiosis

As Claimant has failed to establish that the miner had pneumoconiosis, she cannot establish that the miner's death was due to pneumoconiosis, pursuant to § 718.205.

D. Conclusion

As Claimant has failed to establish that the miner's death was due to pneumoconiosis, pursuant to §718.205(c), Claimant is not entitled to survivor's benefits.

As Claimant is not entitled to benefits, Claimant's attorney is not entitled to a fee.

⁸ Here Dr. Huang stated that the miner had COPD "secondary to mining and smoking."

ORDER

The claim of Barbara E. Antolik for survivor's benefits under the Act is DENIED.

A

Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with the Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20018-7601. A copy of this notice must be served on Donald S. Shire, Associate Solicitor, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.